Supreme Court, U.S.
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08-632 OCT 16 2008

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IN THE SUPREME COURT OF THE UNITED STATES

Case No. _____

ALSC No. 1060813

JANICE ABNER,

Petitioner;

v.

THE SUPREME COURT OF ALABAMA,
MOBILE INFIRMARY MEDICAL CENTER, et al.
Respondent

On Review of the Decision By the Supreme Court of Alabama

PETITION FOR WRIT OF CERTIORARI

Janice Abner, In Pro Se
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Inglewood, California
(310) 412-5710

QUESTIONS FOR REVIEW

1. Whether 42 U.S.C. §1981 provided the right for petitioner to sue medical defendants for breach of contract?

2. If or not a question of broad public interest was presented in issues for review by the Alabama court of final jurisdiction to require equal protection of law under Amendment Fourteen?

3. Whether or not the decision denying writs resulting in denial of civil rights can be sustained by the Tenth Amendment of the United States as to rights and sovereignty of states?

PARTIES - STATEMENT OF CORPORATE DISCLOSURE

Janice Abner, Petitioner
Brian K. Arcement, M.D.
Jeffrey K. Ikler, M.D.
J. Donald Kirby, M.D.
Gregory S. McGee, M.D.
J. Michael O'Dowd, M.D.
Maher N. Sanawneh, M.D.
Phillip S. Travis, M.D.
Terry Wilsdorf, M.D.
Mobile Infirmary Medical Center, Co-Defendant

STATEMENT OF CORPORATE DISCLOSURE

The petitioner, Janice Abner, is a private individual. Parties of persons are in private practice of medicine in privately owned non-corporate businesses. The Mobile Infirmary Medical Center is a privately owned non-corporate business.

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Ex Parte Ghafary, et al. v. Korn, et al., . 738 So. Rptr. 2d, 778, 782, (1998) 7

Hawkins v. Carroll, 676 So. 2d. 338, (1996). Ala. Civ. App. Lexis 130 9

FEDERAL CONSTITUTION CITED:

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FEDERAL STATUTES CITED:

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PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner/Appellant, Janice Abner respectfully petitions the Supreme Court of the United States for Certiorari reversing the decision by the Supreme Court of Alabama affirming the refusal by the lower appellate court to assume jurisdiction over a timely appeal.

Date: October 10, 2008 Respectfully submitted.

Janice Abner

Janice Abner, Petitioner

STATEMENT OF JURISDICTION

The United States Supreme Court has jurisdiction over this matter pursuant to **28 U.S.C., §1331** (Federal question) and **28 U.S.C. §1343(3)** Civil Rights. The judgement by the Supreme Court of Alabama denying writ of Certiorari was entered on 08/08/08.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN CASE

42 U.S.C. §1981(a) provides, "All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enter contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of the persons and property as is enjoyed by white citizens."

Amendment XIV, §1, provides, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment X, The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.

STATEMENT OF CASE

This case arises from an order by the trial court disposing of the underlying complaint for alleged wrongful death and medical malpractice against medical parties, the refusal by the lower appellate court to assume jurisdiction over a timely appeal and affirmation of the decision by denial of writ of certiorari by the Supreme Court of Alabama.

The underlying complaint dismissed on ground of lack of standing alleged breach of medical agreement and unauthorized intervention by associate physicians, resulting in misdiagnosis and death of biological mother.

Trial effectuating remedy was also sought by fact numerous friends of petitioner still reside in Alabama. Petitioner was a former resident of Alabama.

Petitioner as an African American female was similarly situated by formal education to medical defendants, but of different race and gender classification.

No estate existed at the time underlying action commenced as parent five years prior to death conveyed deed to property of only home to petitioner as sole heir. Property was sold after

death and proof was offered by legal document of inexistence of estate and other heirs.

Pursuant to Alabama case law arising from Alabama Power Co. v. White, a person bringing a wrongful death action is only required to prove capacity and standing to bring action. Because there was no estate and due to circumstance of next of kin, petitioner had standing and capacity to bring suit.

Petitioner was forced to bring action in pro se due to inability to secure attorney by fact, three (3) Peer Review Organizations (PRO) of Alabama did prior dismiss pre-trial complaints against multiple medical defendants. Complaints were dismissed despite requirement by Alabama law that norms of the national medical community be utilized for determination of standard of care.

The petitioner did seek review of the orders by petition for writ by a court of first jurisdiction. This writ was subsequently denied.

Petitioner prior to disposition obtained an expert medical witness from California who previously wrote an opinion and autopsy report based on hospital medical records indicating negligence by medical parties, and breach of medical contract and duty.

Subsequent to disposal of underlying wrongful death action, a notice of appeal was filed. The defendants moved to dismiss action on grounds

appeal was untimely, the basis pro offered lack of standing and failure to establish diversity of citizenship.

Prior to move the appellate court to deny appeal, a motion to the court of first jurisdiction seeking order to declare notice date of appeal as delinquent was denied defendants. No appellate review was sought by defendants of order.

The instance in which pleadings of violation of civil rights under "**42 U.S.C. §1981(a)** were presented in pleading entitled "Plaintiff's Reply In Opposition To Motion by Brian Arcement, Donald Kirby, etc.," p. 10, pargh. 1. 09/12/06.

The appeal filed by petitioner was transferred on 12/06/06, by the Supreme Court of Alabama to the Court of Civil Appeals. The lower appellate court refused to assume jurisdiction over the matter. The lower appellate court through the court clerk unofficially granted motions by defendants to deny appeal, and denied reconsideration by petitioner denied.

The matter of denial of civil rights under §1981 was raised in pleadings to the lower appellate court in response pleading titled, "Affirmative Defenses by Appellant in Opposition to Motions by Defendants," p.p. 3 & 4, 12/26/06.

On 02/27/07, a petition for writ of certiorari was filed with the Supreme Court of Alabama seeking review and certiorari. The instance in

which petitioner invoked rights under **42 U.S.C., §1981** was by Petition for Review, 02/23/07, p. 5, pargh. 9.

On 03/07/08, the lower appellate court affirmed order by the trial court denying extraordinary writ seeking review of decisions by PRO dismissing pre-trial agency complaints against medical parties.

On 08/08/08, the Supreme Court of Alabama denied writ of certiorari seeking review of actions by the Court of Civil Appeals refusing to assume jurisdiction over appeal of underlying order.

The Supreme Court of Alabama decided response pleadings by defendants regarding issues in writ were unrequited.

The matter regarding denial of appeal and trial as denial of civil right was raised at the lower appellate level rights in pleading in citing **42 U.S.C., §1981.** (Petition for Review, p. 3, pargh. 1 & 2 dated 02/27/07).

REASONS WHY A WRIT SHOULD ISSUE

A. The Writ Should Issue To Advance National Matter Of The Accountability Of Physicians As Well As A Constitutional Right Of The Petitioner

The petitioner had standing to bring a wrongful death, medical malpractice action based in part on breach of medical contract and duty. Pursuant to Alabama law, the petitioner had standing to bring a wrongful death action seeking effectuation of remedy to improve medical practices of defendants, Alabama Power Co. v. White, 377, So. 2d, 930-934, Ex Parte Ghafary, M.D., et al. v. Korn, M.D., et al., 738 So. Rptr. 2d, 778, 782 Id. 779. The right to such action existed pursuant to **42 U.S.C., §1981(a)** which serves to enforce equal rights in employment contracts, and has been used to challenge the equal protection of the law regarding race discrimination, Gratz v. Bollinger, 123 S. 2411, 2431 (2003).

42 U.S.C., §1981(a) provides, "All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enter contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of the persons and property as is enjoyed by white citizens."

The writ denied petitioner by the Supreme Court of Alabama arose from refusal by the lower court of appeals to assume jurisdiction over a timely appeal after defendants asserted plaintiff had no standing. Appellant-plaintiff as contends offered proof to the contrary to bring action.

Petitioner also contends inference may be formed from facts in this petition that the decision to deny writ granting rights to sue medical defendants arose from the fact petitioner was of a different racial classification than defendants. The action sought remedy out of concern for other citizens of Alabama where petitioner is a native.

The sovereignty of states under the Tenth Amendment does not supersede the laws of Congress; the Tenth Amendment does not make any substantive change to the constitution, and may not be used to deny equal protection of the law based on United States v. Darby, 312, U.S. 100,657, (1941).

> "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." Quoting Mr. Justice Stone, Id Pg. 124.

Contention is made that the decision by the Supreme Court of Alabama to deny certiorari was discriminatory. "Purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate the §1981." Gratz v. Bollinger, 123 S. Ct. Rptr. 2411, 2431, (2003), quoting Justice Ginsberg, Id Pg. 539.

A contends the judgement by the Supreme Court of Alabama denying writ to affirm the refusal to assume jurisdiction over appeal by the lower Appellate Court of Alabama denied the equal protection of the law under law. The writ affirmed the purposeful discrimination by the lower appellate court."

An adverse judgement that has a discriminatory effect may constitute purposeful discrimination when rendered not to sustain or advance a legitimate state goal or national interest. Gratz, Id. 2415, Lockery v. Kayfetz, 917 F. Rptr., 2d, Pg 1150-1157, (1990).

The medical malpractice laws of Alabama express clearly a compelling public interest for efficiency in medical practices according to national norms. This section clearly states standard of medical care by physicians of Alabama must comport with National Community, Hawkins v. Carroll, 676 So. 2d. 338, 1996 Ala. Civ. App., Lexus 130 (Ala. Civil App. 1996).

There is an expressed interest in Alabama by its laws to promote proficiency in practice by its medical doctors and hospitals whereby judgment denying trial did not promote interests of the state.

Conclusion

For all purposes based on pleadings and facts petitioner respectfully requests the Honorable Supreme Court of the United States grant Certiorari reversing the order by the Supreme Court of Alabama affirming denial of appeal to bring case for wrongful death.

Date: 11/06/2008

Janice Abner

Janice Abner, Petitioner

APPENDIX 1

DECISION OF THE SUPREME COURT OF ALABAMA

Date: August 8, 2008, Case No. 1060813; The Judgement entered by the Supreme Court of Alabama denying Writ. "Ex Parte Janice Abner. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Janice Abner v. Mobile Infirmary Medical Center et al.) (Mobile Circuit Court: CV 06-2673; Civil Appeals: 2060218).

CERTIFICATE OF JUDGEMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied. PARKER, J. - Cobb, C.J., and See, Woodall, and Smith, J.J., concur. **Exhibit 1.**

APPENDIX 2

DECISION BY THE CLERK OF THE COURT OF CIVIL APPEALS

Date: January 23, 2007, Case No. 2060218: Decision by the Court Clerk of Civil Appeals of Alabama Re: Janice Abner v. Mobile Infirmary, et al. (Appeal from Mobile Circuit Court: CV 06-2673) **Notice by Court of Civil Appeals of Alabama.** IT IS ORDERED, by the Court of Civil Appeals that the appeal in the above styled cause be, and the same is hereby Dismissed On Motion Of Appellees, Michael O'Dowd, M.D., and Phillip Travis, M.D. - No Opinion.

IT IS FURTHER ORDERED, that the appellant and sureties for the costs of appeal pay the costs of appeal in the court below. (I, John H. Wilkerson, Jr., Clerk for the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 24rd day of January, 2007. John H. Wilkerson, Jr.) **Exhibit 2.**

APPENDIX 3

DECISION BY THE CLERK OF COURT OF CIVIL APPEALS OF ALABAMA

Date: January 9, 2007, Case No.: 2060218. Decision by the Court Clerk of Civil Appeals of Alabama Re: Janice Abner v. Mobile Infirmary, et al. (Appeal from Mobile Circuit Court: CV 06-2673) **Notice by Court of Appeals of Alabama.**

"You are hereby notified that the following action was taken in the above cause, by Court of Civil Appeals. Motion to Dismiss filed by appellees Gregory McGee, Jeffrey Icker, Donald Kirby, M.D., Terry Wilsdorf, M.D., Maher Sahawneh, M.D, Brian Arcement, M.D., and Mobile Infirmary Association d/b/a/ Mobile Infirmary Center are granted. They are dismissed as appellees in this appeal. (Although requested, no opinion by the court ever received). **Exhibit 3.**`

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No. 08-632

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In The
Supreme Court of the United States

JANICE ABNER,

Petitioner,

v.

MOBILE INFIRMARY MEDICAL CENTER; BRIAN ARCEMENT, M.D.; DONALD KIRBY, M.D.; GREGORY McGEE, M.D.; TERRY WILSDORF, M.D.; PHILLIP TRAVIS, M.D.; MAHER SAHAWNEH, M.D.; JEFFERY ICKLER, M.D.; and MICHAEL O'DOWD, M.D.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of Alabama

BRIEF IN OPPOSITION

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QUESTION FOR REVIEW

Whether the Petitioner was deprived of her constitutional and statutory civil rights when the Supreme Court of Alabama denied her Petition for a Writ of Certiorari to the Alabama Court of Civil Appeals, which court had granted Respondents' motion to dismiss Petitioner's appeal from the ruling of the trial court which had dismissed her complaint against Respondents for the wrongful death of her decedent for alleged medical malpractice.

STATEMENT REGARDING COUNSEL FOR RESPONDENTS – Continued

In the courts below different Respondents were represented by different counsel. Inasmuch as the issues are identical for the Respondents and in order to conserve duplicative filings, for purposes of this Brief in Opposition, all of the Respondents are represented on this brief by:

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The other attorneys and their respective clients in the courts below are:

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STATEMENT REGARDING COUNSEL FOR RESPONDENTS – Continued

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LIST OF PARTIES
and
STATEMENT PURSUANT TO RULE 29.6

Parties

Petitioner:

Janice Abner

Respondents:

Brian K. Arcement, M.D.
Jeffery K. Ickler, M.D.
J. Donald Kirby, M.D.
Gregory S. McGee, M.D.
J. Michael O'Dowd, M.D.
Maher N. Sahawneh, M.D.
Phillip S. Travis, M.D.
Terry Wilsdorf, M.D.
Mobile Infirmary Medical Center

Each of the Respondent-Physicians is engaged in the private practice of medicine either in a partnership or in a privately owned entity. There are no parent or public corporations involved with these entities.

The Respondent Mobile Infirmary Medical Center is the name under which Mobile Infirmary Association does business and it is a non-profit corporate entity. Infirmary Health Systems, Inc., a private corporation, is its parent corporation. There is no publicly held company that owns 10% or more of its stock.

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May It Please This Honorable Court:

STATEMENT OF THE FACTS

The Respondents submit that a brief background of proceedings in this case would perhaps be of benefit to the Court in its consideration of the Petition.

PROCEDURAL BACKGROUND

The Petitioner, together with her father, initially filed suit on July 20, 2004, in the United States District Court for the Southern District of Alabama against the Respondent hospital and eight (8) Respondent physicians alleging that their wife and mother, Lillian Abner, died on August 5, 2002 as the proximate result of medical malpractice by all of the Respondents.[1] That case (like this case) was not brought by the personal representative of Ms. Lillian Abner's estate as required by the laws of the State of Alabama under § 6-5-410, *Code of Alabama* (1975).

Motions to dismiss were filed by all the Respondents in the U.S. District Court case. Among the issues raised were (1) improper party plaintiff, (2) jurisdiction under the Medicare Act, and (3) sufficiency of the

[1] *Clarence Abner and Janice Abner v. Mobile Infirmary*, U.S. District Court, Southern District of Alabama, Civil Action No. 04-0476 (unreported) (Appendix I).

allegations of medical malpractice under Section 6-5-551 of the Code of Alabama. The District Court granted the motions to dismiss all the Respondents on February 2, 2005. (A copy of the District Court's order is appended hereto as Appendix I.) In its order the District Court noted that it did not have Federal jurisdiction because the claims asserted did not arise under the Medicare Act. The court noted that even if a federal question existed in the case, it was not brought by the proper parties. The court stated that:

> "Except where the decedent is a minor child, only the personal representative of a decedent may sue for wrongful death. (*Hatas v. Partin*, 175 So. 2d 759, 761 (Ala. 1965)."

It should also be noted that under Alabama law, a person must be a licensed attorney to represent a separate legal entity, such as a corporation or estate. *Ala. Code* § 34-3-6 (1975); *Ex parte Ghafary*, 738 So. 2d 778 (Ala. 1998).

Petitioner appealed the U.S. District Court ruling to the U.S. Court of Appeals for the Eleventh Circuit, and, by opinion dated August 31, 2005, the Court of Appeals affirmed the District Court.[2] The Petitioner took no further action in that particular case.

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[2] See *Abner v. Mobile Infirmary Hospital*, 149 Fed.Appx. 857, 2005 WL 2090635 (11th Cir. 2005). (The case was not selected for publication in the Federal Reporter.)

SUBJECT CASE

The Petitioner then, on July 31, 2006 (almost a year later), filed this lawsuit in the Circuit Court of Mobile County, Alabama against all of the same Respondents seeking recovery for damages for the alleged medical malpractice of the Respondents in causing the wrongful death of Ms. Lillian Abner. The cause of action for wrongful death under the Alabama Medical Malpractice statute would have arisen on August 5, 2002, the date of Ms. Lillian Abner's death, and the claim was barred by the two years statute of limitations of § 6-5-482(a) and § 6-5-410, *Code of Alabama* (1975). *Horn v. Citizens Hospital*, 425 So. 2d 1065 (Ala. 1982); *Benefield v. F. Hood Craddeck Clinic*, 456 So. 2d 52 (Ala. 1984).

All of the Respondents filed motions to dismiss this action in the state trial court on the grounds, among others, of (1) improper party plaintiff, (2) the statute of limitations of two years had expired, and (3) res judicata based on the previous U.S. District Court action. The Petitioner filed a response to the motions, and the Circuit Court of Mobile County, Alabama gave notice that the motions were set for oral argument on September 29, 2006. The Petitioner advised the trial judge that she would not appear in court for the hearing on the motions to dismiss. On September 29, 2006 and October 20, 2006, the trial judge, after considering arguments and the written

response of the Petitioner, entered final orders granting the motions of Respondents to dismiss the case.[3]

The Petitioner, on November 21, 2006, then appealed to the Supreme Court of Alabama, which Court transferred the case to the Alabama Court of Civil Appeals pursuant to § 12-2-7(6), *Code of Alabama* (1975). Motions to dismiss the appeal were subsequently filed by all the Respondents in the Alabama Court of Civil Appeals on the primary grounds that (1) the appeal was not timely filed; (2) the appeal was a nullity because (a) the Petitioner was not authorized, as a matter of law, to represent the interests of another's estate, *Ex parte Ghafary*, *supra*, and (b) the Petitioner was not a representative of the decedent's estate, § 6-5-410, *Code of Alabama* (1975); *Waters v. Hipp*, 600 So. 2d 981, 982 (Ala. 1992); (3) that the two year statute of limitations of the Alabama Wrongful Death Action had run, (4) the doctrine of res judicata applied, and (5) the appeal was frivolous. Ala.R.App.P. 2(a)(2)B. After the filing of briefs, the motions to dismiss were granted on January 9, 2007 and January 23, 2007 by the Alabama Court of Civil Appeals. (Appendices IV and V.) The Petitioner then filed a Petition for a Writ of Certiorari to the Supreme Court of Alabama. On August 8, 2008, the Supreme Court of Alabama denied the petition,

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[3] Copies of the orders of dismissal are appended hereto as Appendices II and III.

and the Petitioner filed the subject petition to this Honorable Court. (Appendix VI.)

ARGUMENT AGAINST GRANTING CERTIORARI

I

THE PETITIONER HAS NOT BEEN DENIED ANY OF HER CIVIL RIGHTS, AND THE PETITION FOR CERTIORARI FILED IN THE SUPREME COURT OF ALABAMA WAS DENIED ON APPLICABLE LEGAL GROUNDS.

Standing and Capacity to Sue

The questions of civil rights violations or of race of the parties have never been issues raised in the courts below. The Petitioner's lawsuit is one of medical malpractice in which the Petitioner alleges that the Respondents negligently treated her mother and thereby proximately caused her death. Section 6-5-410 of the *Code of Alabama* (1975) (commonly referred to as the "Alabama Wrongful Death" statute) provides in pertinent part:

> "(a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omissions or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator

> or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused death."
>
> * * *
>
> "(d) Such action must be commenced within two years from and after the death of the testator or intestate."

The Alabama Supreme Court has held that, except where the decedent is a minor child, only the personal representative of a decedent may sue for wrongful death. *Hatas v. Partin*, *supra*. The Petitioner does not dispute that she has never been appointed the personal representative of her deceased mother. She argues that there is no estate of her mother as there are no assets and, consequently, no need to open an estate in order to file this action. That is simply not the case as the statutory requirement of being the personal representative is a prerequisite to filing a wrongful death action in Alabama. Further, the cause of action itself (whether meritorious or not) became an asset of the estate. Inasmuch as the Petitioner was not the personal representative of the decedent's estate, the lawsuit was a nullity, and the court below properly dismissed the Petitioner's case. *Waters v. Hipp*, *supra*.

Further, the Alabama Supreme Court has held that only a licensed attorney can represent a separate legal entity, such as a corporation or an estate. *Ala. Code* § 34-3-6 (1975); *Ex parte Ghafary*, 738 So. 2d

778 (Ala. 1998). The Petitioner is not a licensed attorney.

These issues were also raised in the U.S. District Court case filed by the Petitioner against the same Respondents and were decided adverse to the petitioner. This decision was affirmed by the Eleventh Circuit Court of Appeals. (See Appendix I and footnote no. 2.)

The Petitioner did not have capacity or standing to bring this wrongful death action in the Circuit Court of Mobile County, Alabama.

Timeliness of Filing Suit

The Petitioner's cause of action, if any, arose on the date of Ms. Lillian Abner's death on August 5, 2002. The two year statute of limitations of § 6-5-410(d), *Code of Alabama* (1975) expired on August 5, 2004. The subject lawsuit was not filed until July 31, 2006, or almost four (4) years after the cause of action arose. Clearly, the statute of limitations barred the Petitioner's lawsuit. *Downtown Nursing Home, Inc. v. Pool*, 375 So. 2d 465 (Ala. 1979).

Timeliness of Appeal to the Alabama Supreme Court

The trial court entered a final order on September 29, 2006 granting the motions to dismiss the Petitioner's complaint as to the Respondents Mobile Infirmary Medical Center and physicians, McGee,

Ickler, Kirby, Arcement, Sahawneh and Wilsdorf. (Appendix II).

Pursuant to Rule 4 of the Alabama Rules of Appellate Procedure, the Petitioner was required to file a notice of appeal with the clerk of the court within 42 days of the entry of the Final Order of Dismissal. Thus, as to the named Respondents, Petitioner's appeal was not timely. A timely notice of appeal is necessary to invoke the jurisdiction of the Supreme Court of Alabama. *Altmayer v. Stremmel*, 891 So. 2d 305 (Ala. 2004), and Petitioner's appeal as to these Respondents was due to be dismissed on the grounds above.

Res Judicata

The current lawsuit involves the same parties and the same issues as the lawsuit filed by the Petitioner in the U.S. District Court. That case was decided against the Petitioner and in favor of the Respondents. The U.S. District Court case is res judicata to the case *sub judice*. *Neal v. Neal*, 856 So. 2d 766 (Ala. 2002); *Carroll v. Buttram*, 758 So. 2d 1097 (Ala. 1999).

Non-Applicability of 42 U.S.C. § 1981(a)

The Petitioner argues that her civil rights have been infringed upon in this case and suggests by her Petition that an inference can be drawn that the Alabama Supreme Court denied her Petition for a

Writ of Certiorari because she was of a different racial classification than the Respondents. There is no basis whatsoever in the records of this case to suggest such an inference. Clearly, there is nothing in the records of this case to suggest 42 U.S.C. § 1981(a), or U.S. Constitution Amendments X and XIV have in any manner been violated adverse to the Petitioner in this case.

Regardless of the race of a plaintiff in an Alabama wrongful death action, the lawsuit for that death can only be brought by the deceased's personal representative. The Petitioner, although acting *pro se*, must have known this from the opinion issued by the United States District Court in her first lawsuit filed for wrongful death against these Respondents. In its opinion, the Court specifically held: "Because plaintiffs are not the personal representative of decedent's estate, the case should be dismissed." (Appendix I.) However, even in view of this holding, the Petitioner re-filed her case in the state court (after the two year statute of limitations had run) without being named personal representative of the decedent.

Although the Alabama Wrongful Death Act has been held constitutional,[4] the Petitioner argues that

---

[4] *Old Republic Union Ins. Co. v. Tillis Trucking Co.*, 124 F.3d 1258, 1997 U.S. App. Lexis 28422 (11th Cir. 1997); cert. denied, 523 U.S. 1047 (1998).

the court has discriminated against her, and others similarly situated in the State of Alabama. There is absolutely no substance to such an argument. Section 6-5-410, *Code of Alabama* (1975) states: "A personal representative may commence an action. . . ." The Petitioner simply did not qualify as a personal representative and is not the proper party to bring the action. In addition, the Alabama law provides that only a duly licensed attorney can represent a separate legal entity such as a corporation or an estate. In any event, the Alabama Statute of Limitations of two years (§ 6-5-410(d), *Code of Alabama* (1975)) had expired prior to the time the Petitioner filed this lawsuit in the state court and, in addition, the notice of appeal as to most of the Respondents was untimely.

There was no discrimination by the Alabama courts against the Petitioner, and there has been no violation of the Petitioner's constitutional rights. The Petitioner in the court below failed to comply with Alabama laws which are applicable to all citizens.

CONCLUSION

For the reasons stated, the Supreme Court of Alabama correctly denied the Petitioner's Petition for a Writ of Certiorari and the Petitioner was not discriminated against nor denied any of her constitutional rights. The premises considered, it is respectfully submitted that the Petitioner has not presented any compelling reason for the granting of her Petition for a Writ of Certiorari and the same should be denied.

Respectfully submitted,

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Appendix I

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CLARENCE ABNER and JANICE ABNER,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION NO. 04-0476-CG-M**
MOBILE INFIRMARY, *et al.*,	)	
Defendants.	)	

ORDER

This matter is before the court on motions of defendants to dismiss (Docs. 7, 11, 14, 20, 22), plaintiffs' responses thereto (Docs. 17, 26, 29, 30), defendants' replies (Docs. 27, 31, 33) and plaintiffs' response to the replies (Doc. 40). The court finds that federal question jurisdiction does not exist in this case, and further, that the action was not brought by the proper parties. Therefore, defendants' motions to dismiss are due to be granted.

BACKGROUND

Plaintiffs, Clarence and Janice Abner, proceeding *pro se*, brought this action seeking damages for the wrongful death of Lillian Abner. The complaint asserts federal question jurisdiction arising from

defendants' alleged violation of a Medicare statute, 42 CFR § 35.15, which requires written consent of Medicare patients prior to performing certain medical procedures. The complaint also states that the action is also brought pursuant to Alabama Code § 22-8-1, which concerns consent requirements for medical treatment Plaintiffs are the husband and daughter of decedent, Lillian Abner. The personal representative of decedent's estate has not appeared in this action as a party plaintiff or in any other capacity. Defendants are the medical facility where decedent was a patient and the doctors who, according to plaintiffs, "either ordered diagnostic intervention, served as consultant, or ordered the treatment of decedent while a patient at Mobile Hospital, without the informed consent of decedent, nor gave notice thereof, or received authorization from the family . . . " (Doc. 17 at p.3).

DISCUSSION

Rule 8 of the Federal Rules of Civil Procedure requires that federal courts give pleadings a liberal reading in the face of a motion to dismiss. *GJR Investments, Inc. v. County of Escambia,* 132 F.3d 1359, 1369 (11th Cir. 1998). "This admonition is particularly true when the parties are proceeding *pro se.*" *Id.* As the Eleventh Circuit has noted:

> Courts do and should show a leniency to *pro se* litigants not enjoyed by those with the benefit of a legal education. *See, e.g., Powell v. Lennon,* 914 F.2d 1459, 1463 (11th

> Cir.1990). Yet even in the case of pro se litigants this leniency does not give a court license to serve as *de facto* counsel for a party, *see Hall v. Bellmon,* 935 F.2d 1106, 1109 (10th Cir.1991), or to rewrite an otherwise deficient pleading in order to sustain an action, *see Pontier v. City of Clearwater,* 881 F.Supp. 1565, 1568 (M.D.Fla.1995).

GJR Investments Inc. v. County of Escambia, Fla., 132 F.3d 1359, 1369 (11th Cir. 1998). Thus, while plaintiffs' complaint should be read liberally, the court will not fabricate a jurisdictional basis that is not apparent from the complaint.

Defendants assert that plaintiffs have not established federal question jurisdiction. "Federal courts are courts of limited jurisdiction." *Burns v. Windsor Co.,* 31 F.3d 1092, 1095 (11th Cir. 1994).

> Under the federal question jurisdiction statute, 28 U.S.C. § 1331, a district court has subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Whether a claim arises under federal law for purposes of 28 U.S.C. § 1331 is generally determined by the well-pleaded complaint rule, "which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiffs properly pleaded complaint" *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987). A well-pleaded complaint presents a federal question where it "establishes

> either that federal law creates the cause of action or that the plaintiffs right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27-28, 103 S.Ct. 2841, 2856, 77 L.Ed.2d 420 (1983).

Smith v. GTE Corp., 236 F.3d 1292, 1310 (11th Cir. 2001). Plaintiffs assert that this court has federal question jurisdiction because the case is brought under the Medicare Act. However, the complaint does not seek benefits under the Medicare Act. The complaint seeks "compensatory and general damages" for alleged "physical injury caused by misdiagnosis and wrongful suffering and immediate death due to misdiagnosis and negligence leading to said injury." The court finds that the claims do not arise under the Medicare Act, nor is plaintiffs' right to relief necessarily dependant on the resolution of a substantial question of federal law.

In *Ardary v. Aetna Health Plans of California, Inc.*, 98 F.3d 496 (9th Cir. 1996) certiorari denied (1997) 520 U.S. 1251, 117 S.Ct. 2408, 138 L.Ed.2d 174 (cited by both plaintiffs and defendants), the plaintiffs brought an action seeking compensatory and punitive damages for the improper denial of emergency medical services and misrepresentation of managed care to a Medicare patient. The Court found that the claims did not arise under the Medicare Act and that the action was improperly removed to federal court for the following reasons:

> First, the Ardary's complaint does not "include any claims in which 'both the standing and the substantive basis for the presentation' of the claims" is the Act. *Heckler v. Ringer*, 466 U.S. 602, 615, 104 S.Ct. 2013, 2021-22, 80 L.Ed.2d 622 (1984) (citing *Weinberger v. Salfi*, 422 U.S. 749, 760-61, 95 S.Ct. 2457, 2464-65, 45 L.Ed.2d 522 (1975)) (emphasis added). The Ardarys seek general and punitive damages on the basis of negligence, intentional and/or negligent infliction of emotional distress, intentional and/or negligent misrepresentation, and professional negligence. The standing for these six claims are state common law theories and not the Act. Second, the state law claims are not "inextricably intertwined" with the denial of benefits. Although the Ardarys concede that their wrongful death complaint is "predicated on" Arrowest's failure to authorize the airlift transfer, the claims are not "inextricably intertwined" because the Ardarys are at bottom not seeking to recover benefits. *Ringer*, 466 U.S. at 614, 104 S.Ct. at 2021.

Ardary, 98 F.3d at 499-500. The claims asserted and damages sought by plaintiffs in the instant case are similar to the claims asserted and damages sought in *Ardary*.

Similarly, in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229 (1986) (also cited by both plaintiffs and defendants), the Supreme Court held that the district court did not have jurisdiction under 28 U.S.C. § 1331 where the plaintiff

alleged a state tort claim but pointed to federal law as evidence of the standard of care. Given that there was no private right of action under the federal law in question, the Court examined whether a substantial question of law was implicated. It held that "the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system." *Id.* at 814, 106 S.Ct 3229. The Court found no federal subject matter jurisdiction.

The Eleventh Circuit, following the rational of *Merrell Dow,* found no federal subject-matter jurisdiction over a discrimination claim based upon a breach of a duty created under the Americans with Disabilities Act. *Jairath v. Dyer,* 154 F.3d 1280 (11th Cir. 1998) (again cited by both sides). There the appeals court found that the district court lacked subject-matter jurisdiction over the case because the claims did not "arise under" federal law. The plaintiff had no standing to pursue the only federal private cause of action available under the ADA (i.e., for injunctive relief). *Id.*, at 1284.

In the instant case, as in *Ardary*, *Merrell Dow* and *Jairath*, plaintiffs do not have standing to pursue a private cause of action under the federal statute in question. The Medicare Act provides for the Office of Inspector General to impose penalties and assessments, but does not create a private cause of action. *See* 42 C.F.R. § 1003.100 *et seq.* Such penalties and assessments may be judicially reviewed under certain circumstances. *See* 42 C.F.R. § 1003.127. However, in

the instant case, plaintiffs do not seek review of penalties or assessments and there is no allegation that any penalties or assessments were even imposed. Therefore, the court finds that plaintiffs' causes of action do not arise under the Medicare Act.

Plaintiffs also raise the doctrine of *res ipso loquitur*, however the court finds the doctrine inapplicable to the jurisdictional determination in this case. Evidence that defendants were negligent does not provide federal jurisdiction.

Plaintiffs also mention the *Rooker-Feldman* doctrine which precludes federal review by district courts when a state court judgment is challenged by a party to the state court action. *Johnson v. De Grandy,* 512 U.S. 997, 1005, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). That doctrine is also inapplicable as there is no state court judgment to be reviewed in this case.

Plaintiffs further argue that their constitutional rights were violated, but it is not clear to what constitutional rights they refer. Plaintiffs assert that their claims are premised on the victim's Fourteenth Amendment right to due process. However, it is unclear what due process rights could have been violated. The Due Process Clause of the 14th Amendment protects individuals against governmental action that either " 'shocks the conscience,' *Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct, 205, 96 L.Ed. 183 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' *Palko v. Connecticut,* 302 U.S. 319, 325-326, 58 S.Ct. 149, 82 L.Ed. 288

(1937)." *United States v. Salerno,* 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The defendants in this case consist of a private, non-profit hospital and private individuals. The court is not aware of any constitutional right that would be impinged by defendants' alleged action or inaction which is the subject of the instant complaint. The court finds mere reference by the plaintiffs to due process violations and to constitutional violations is insufficient to assert a federal claim. *See Adams v. Robertson,* 520 U.S. 83, 89, n. 3, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) (per curiam) (concluding that "passing invocations of 'due process'" that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a federal claim was presented"); *Webb v. Webb,* 451 U.S. 493, 496, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981) (finding a reference to "full faith and credit" insufficient to raise a federal claim without a reference to the U.S. Constitution or to any cases relying on it); *New York Central R. Co. v. New York,* 186 U.S. 269, 273, 22 S.Ct. 916, 46 L.Ed. 1158 (1902) ("[I]t is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth"); *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655, 17 S.Ct. 709, 41 L.Ed. 1149 (1897) (a party's intent to invoke the Federal Constitution must be unmistakably" declared, and the statutory requirement is not met if "the purpose of the party to assert a Federal right is left to mere inference").

Even if federal question jurisdiction existed in this case, defendants argue that this case has not been brought by the proper parties. Alabama's wrongful death statute, provides that "[a] personal representative may commence an action and recover such damages . . . for the wrongful act, omission, or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused . . . " ALA. CODE § 6-5-410. Except where the decedent is a minor child, only the personal representative of a decedent may sue for wrongful death. *Hatas v. Partin* 175 So.2d 759, 761 (Ala. 1965). Defendants assert that under Alabama law, a person must be a licensed attorney to represent a separate legal entity, such as a corporation or estate. *See* ALA. CODE § 34-3-6; *Ex parte Ghafary,* 738 So.2d 778 (Ala. 1998). Plaintiffs' only response is that they diligently sought legal representation for the action but were unable to find an attorney to represent the decedent. Because plaintiffs are not the personal representative of decedent's estate, the case should be dismissed. *See Waters v. Hipp,* 600 So.2d 981, 982 (Ala. 1992) ("One who sues under this section without having been appointed executor or administrator does not qualify under this section as a personal representative, and the suit is a nullity." citations omitted).

Plaintiff requests additional time to amend his complaint and to join additional parties. (Doc. 40). However, there has been no showing that an amendment would cure the jurisdictional defects in this

case. The court finds it would be futile to allow plaintiffs to amend their complaint and/or join additional parties.

CONCLUSION

For the reasons stated above, defendants' motions to dismiss (Docs. 7, 11, 14, 20, 22) are **GRANTED** and this case is hereby **DISMISSED**.

DONE and ORDERED this 2nd day of February, 2005.

/s/ Callie V. S. Granade
CHIEF UNITED STATES
DISTRICT JUDGE

Appendix II

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

JANICE ABNER,	)	
Plaintiff,	)	
v.	)	**CIVIL ACTION**
MOBILE INFIRMARY MEDICAL CENTER, et al.,	)	**NO. CV-06-2673**
Defendants.	)	

FINAL ORDER OF DISMISSAL

The Court convened a hearing on September 29, 2006, on the following Motions:

1. Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim filed by Defendants Gregory McGee and Jeffery Ickler;

2. Motion of Defendants Donald Kirby, M.D., Terry Wilsdorf, M.D., Maher Sahawneh, M.D. and Brian Arcement, M.D. to Dismiss; and

3. Defendant Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center's Motion to Dismiss.

The Court had notified Plaintiff of the date and time of this hearing, and plaintiff had spoken to the Court by telephone on two occasions regarding the hearing. In her most recent communication to the Court, the Plaintiff stated that she would not attend the hearing for these Motions to Dismiss. Defense counsel advised

the Court during the hearing that Plaintiff had also spoken to two defense counsel, that one of the defense counsel had sent a notice of the hearing schedule to Plaintiff and that Plaintiff had also told defense counsel that she would not attend the hearing. Plaintiff had filed a response to the Motions to Dismiss which the Court received on September 28, 2006 and read and considered before ruling on the pending Motions to Dismiss. Having considered oral argument of counsel and the response of Plaintiff, it is hereby ORDERED, ADJUDGED and DECREED that the Motions to Dismiss referenced above are GRANTED. The Court has determined that there is no just reason to delay an entry of final judgment and the Court does hereby direct entry of final judgment of dismissal of all claims against Gregory McGee, Jeffery Ickler, Donald Kirby, M.D., Terry Wilsdorf, M.D., Maher Sahawneh, M.D., Brian Arcement, M.D., and Mobile Infirmary Association d/b/a Mobile Infirmary Medical Center.

DONE this 29th day of September, 2006.

/s/ _____
Judge Herman Thomas
Circuit Judge

COPY TO: A. Danner Frazer, Esq.
Ms. Janice Abner (Certified Mail)
Patrick Shegon, Esq.
Cifford Brady, Esq.
W. Boyd Reeves, Esq.

Appendix III

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

JANICE ABNER,	§	
Plaintiff,	§	
V.	§	
MOBILE INFIRMARY MEDICAL CENTER;	§	
BRIAN ARCEMENT, M.D.;	§	
JEFFERY ICKLER, M.D.;	§	**CASE NO.:**
DONALD KIRBY, M.D.;	§	**CV-06-2673**
GREGORY McGEE, M.D.;	§	
MICHAEL O'DOWD, M.D.;	§	
PHILLIP TRAVIS, M.D.;	§	
MAHER SAHAWNAH, M.D.;	§	
TERRY WILSDORF, M.D., et al.,	§	
Defendants.	§	

ORDER OF DISMISSAL

This mater comes before the Court on the motion to dismiss filed by defendants, Michael O'Dowd, M.D. and Phillip Travis, M.D. These defendants raised grounds for dismissal like those of the co-defendants who were all dismissed by order of this Court dated September 29, 2006. A hearing on the motion to dismiss filed by defendants O'Dowd and Travis was held on October 20, 2006. The Court notes that the plaintiff was given sufficient notice of the date and time of this hearing, but the plaintiff did not attend.

The Court has received the plaintiff's reply in opposition to these defendants' motion to dismiss and has read and considered same before ruling on the pending motion to dismiss. Having considered oral argument of counsel and the response of plaintiff, it is hereby **ORDERED, ADJUDGED and DECREED** that the motion to dismiss on behalf of defendants O'Dowd and Travis is hereby **GRANTED**. The Court has determined that there is no just reason to delay an entry of final judgment and the Court does hereby direct entry of final judgment of dismissal with prejudice of all claims against defendants, Michael O'Dowd, M.D. and Phillip Travis, M.D.

DONE this 20th day of October, 2006.

/s/ _____
HERMAN THOMAS
Circuit Judge

cc: Ms. Janice Abner
Patrick M. Shegon, Esq.
A. Danner Frazer, Esq.
W. Boyd Reeves, Esq.
Clifford Brady, Esq.

Appendix IV

STATE OF ALABAMA
COURT OF CIVIL APPEALS

[SEAL]

John H. Wilkerson, Jr.
Clerk

300 Dexter Avenue
Montgomery, AL 36104-3741

Rebecca C. Oates
Assistant Clerk

Phone (334) 242-4093
Fax (334) 242-4017

January 9, 2007

2060218

Janice Abner v. Mobile Infirmary Medical Center et al. (Appeal from Mobile Circuit Court: CV 06-2673)

You are hereby notified that the following action was taken in the above cause, by the Court of Civil Appeals

Motions to dismiss filed by appellees Gregory McGee, Jeffery Ickler, Donald Kirby, M.D., Terry Wilsdorf, M.D., Maher Sawawneh, M.D., Brian Arcement, M.D., and Mobile Infirmary Association d/b/a/ Mobile Infirmary Medical Center are granted. They are dismissed as appellees in this appeal.

/s/ John H. Wilkerson, Jr.
John H. Wilkerson, Jr.
Clerk, Court of Civil Appeals

Appendix V

STATE OF ALABAMA
COURT OF CIVIL APPEALS

[SEAL]

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January 23, 2007

2060218

Janice Abner v. Mobile Infirmary Medical Center et al. (Appeal from Mobile Circuit Court: CV 06-2673)

IT IS ORDERED, by the Court of Civil Appeals that the appeal in the above styled cause be, and the same is hereby Dismissed On Motion Of Appellees, Michael O'Dowd, M.D., and Phillip Travis, M.D. – No Opinion.

IT IS FURTHER ORDERED that the appellant and sureties for the costs of appeal, pay the costs of appeal in the court below.

I, John H. Wilkerson, Jr., Clerk of the Court of Civil Appeals of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 23rd day of January, 2007.

/s/ John H. Wilkerson, Jr.
John H. Wilkerson, Jr.

Appendix VI

IN THE SUPREME COURT OF ALABAMA

[SEAL]

August 8, 2008

1060813

Ex parte Janice Abner, PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS (In re: Janice Abner v. Mobile Infirmary Medical Center et al.) (Mobile Circuit Court: CV 06-2673; Civil Appeals : 2060218).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

PARKER, J. – Cobb, C.J., and See, Woodall, and Smith, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 8th day of August, 2008.

/s/ Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

Supreme Court, U.S.
FILED
DEC 13 2008
OFFICE OF THE CLERK

114 (3)

IN THE SUPREME COURT OF THE UNITED STATES

Case No. 08-632
ALSC No. 1060813

JANICE ABNER,

Petitioner;

v.

THE SUPREME COURT OF ALABAMA,
MOBILE INFIRMARY MEDICAL CENTER, et al.
Respondent

On Review of the Decision By the Supreme Court of Alabama

REPLY TO BRIEF IN OPPOSITION

Janice Abner, In Pro Se
888 Victor Avenue, Unit 16
Inglewood, California 90302
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PRELIMINARY REQUEST FOR NOTICE

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Janice Abner respectfully requests the Court take notice preliminarily of statement of appearance of violation of Court Rules for pleadings by defendant in Brief of Appellee invalid.

The defendants plead a case under nonexistent title by fact of the caption on the reply in opposition to certiorari fails to comport with the title of Writ for Certiorari by petitioner. The afore-referenced petition lists as parties the Supreme Court of Alabama and Mobile Infirmary Medical Center, et al., Respondent, real party in interest. The Brief of Appellee captions Party as solely Mobile Infirmary Medical Center, et al. while pleading a defense for the Supreme Court of Alabama.

The caption of statement for review on cover of Brief of Appellee fails to capture statement for review on cover of Brief of Appellant. The Brief of Appellee on the face of brief states "**On petition for writ of certiorari to the Court of Civil Appeals**." However, no petition for writ was brought by Petitioner to the Court of Civil Appeals of Alabama. The appendixes clearly prove the last

judgment entered denied writ of certiorari by the Supreme Court of Alabama.

Certiorari Should Be Granted As Defense In Opposition Thereto To Deny Based On Res Judicata Is Unmeritorious

The Doctrine of Res Judicata operates to bar re-litigation of claims between same parties upon the rendering of a final decision as a judgment on the merits. For Res Judicata to apply, there must be (1) an identity of claims and (2) a final judgment on the merits and identity of parties, Western Radio Servs Co., Inc. v. Glickman, 123 F. 3d. 1189, 1192 (1997).

Defendants assert Res Judicata as bar to grant of certiorari, and submitted judgment dismissing a federal action brought in the year 2004 against identical parties in current action in a complaint for alleged wrongful death-medical malpractice. However, unincorporated in the complaint was the claim for fraud brought in the underlying state claim dismissed in the year 2006. Also, the identity of parties is nonexistent to operate as bar as the plaintiffs in the federal actions were petitioner and father, (Appendix 1, Brief of Appellee in Opposition) whereas in the subsequent state action petitioner was sole plaintiff.

The prior federal complaint alleged violations under Amendment Fourteen of due process (Appendix 1, Brief of Appellee in Opposition, Appendix 7) whereas in contrast, the petition for federal certiorari alleges denial of equal protection under the Due Process Clause of Amendment Fourteen. Therefore, the identity in claims requirement required for Res Judicata to serve as claim preclusion is also absent.

A view of the copy of the year 2004 judgment in the Appendix clearly will reveal Res Judicata did not act to bar underlying state complaint of 2006. Referenced complaint of 2004 was dismissed primarily due to lack of court jurisdiction as plaintiffs failed to establish diversity of citizenship requirement under Alabama Code, § 6-5-410 to bring a wrongful death action in Alabama. In the subsequent state claim the requisite was met.

The Supreme Court of Alabama as the basis for affirming an order granting summary judgment to defendants in a wrongful death declared, "No proceedings has been filed in the Probate Court for the appointment of an appointment or executor," Waters v. Hipp, 600 So. 2d 981, 981 (1992). The referenced basis is inapplicable in Abner v. Mobile Infirmary Medical Center, et al., 2006 as plaintiff, despite absence of estate and as sole heir, did prior petition Probate Court of Alabama seeking

assignment as conservator of any estate if existent, or in the alternative, for a court-appointed conservator. The petition was denied on grounds of non-residency of the state.

It is submitted by fact application for conservator was brought prior to trial by petitioner. Petitioner as plaintiff did satisfy the statutory requirement to bring action. Contention is further held that the initial instant federal action did not act as bar. "Even if the threshold requirements are established, Res Judicata will not be applied if injustice would result, or if the public interest requires that re-litigation be foreclosed," Bame v. City of Del Mar, 104 Cal Rptr. 2d, 183, 190, (2001).

Defendant absent pleading under declaration of perjury asserts the petition for certiorari should be denied on grounds of estoppel as issue of discrimination under §1981 was never raised at any stage of proceedings in the courts (p. 8 Brief in Opposition). The record will prove, if existent and secured from the Appellate Courts of Alabama, contrary. Plaintiff never requested a conformed copy of pleadings upon filing.

The matter of denial of equal rights under §1981 was pleased as cited in the petition for federal writ in the courts of original jurisdiction, the Middle Appellate Court and Court of Final

Jurisdiction of Alabama. Also, the judgments by the appellate court incorporated in the Appendix which defendant claims bear a court seal were never submitted by the Court of Appeals to petitioner.

Defendant Has Failed To Establish Argument Petitioner Was Want Of Legal Standing To Bring Action For Wrongful Death

By existent statutory requirements of §6-5-410, the Alabama Wrongful Death Act requires a personal representative bring action as cited by defendants in opposition to certiorari. Defendants argue petitioner is want of legal standing to bring such action under Alabama law, despite invoking a federal right under 42 U.S.C. §1981. The statute affords equal rights for individuals "to make and enter contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of the persons and property as is enjoyed by white citizens."

The Wrongful Death Act of Alabama was enacted in the year 1875 twelve (12) years following abolition of slavery in the United States in 1863. Referenced Act has not been amended. Statutory requisite then, as today, mandated the deceased

own property of an estate and only a personal representative action, Hatas v. Partin, 278 Ala. 65, 175 So. 2d., 757 (1965). The personal representative's primary duty, however, is to distribute among heirs the estate of testate or intestate, Kuydendall v. State, 87 So. Rptr., 882, 885 (1921).

In a challenge to the constitutionality of the Wrongful Death Act, the Supreme Court of Alabama upheld the act as constitutional in opining, "The statute serves to preserve human life, and should be given liberal construction with the Alabama Constitution," Alabama Power Co. v. Turner, 575 So 2d, 551, 562 (1992). However, the Court reduced the jury award. In dissenting, Justice Houston opined:

> "The Constitution of Alabama 1901, Art. I, §1, provides as follows:
>
> "That the great, general, and essential principles of liberty and free government may be recognized and established, *we declare:*
>
> *"That all men* are equally free and independent; that they *are endowed* by their Creator *with certain inalienable rights; that among these are life,* liberty and the pursuit of happiness."

"(Emphasis supplied.) This declaration of the right to life appeared in the Alabama Constitution of 1975 (Art. I, §1), '[A]ll men ... are endowed ... with [the right to] life' -- the right to life that is 'inalienable' (that may not be taken away," ...

"The Alabama Constitution has declared that the citizens of Alabama have a right to life. Art. I, §13, of the Alabama Constitution, provides 'that every person, for any injury done him, in his ... person ..., shall have a remedy by due process of law.' Therefore, with the Constitution declaring that there is both a right to life and a right to a remedy for a violation of that right, it is my opinion that neither the legislature or the judiciary can take way from the citizens of Alabama the right to be compensated for the deprivation of the right to life if that deprivation is caused by the wrong of another. The compensation must be paid to the estate of the decedent, which is a legal extension of the decent beyond death. ...

"Regardless of our feeble attempt to interpret §6-5-410 in the light of imagined common law rights and remedies, there is a constitutional right to life; there is a constitutional right to a remedy for a wrongful deprivation of the right to life. The

> common law is the law of this State *only* 'as it is not inconsistent with the Constitution, laws and institutions of this State.' Ala. Code 1975, §1-3-1. In my opinion, in Alabama it is unconstitutional for the legislature or the judiciary (and I believe that the fault lies exclusively with the judiciary, *Tatum*, 523 So. 2d at 1050-52, 1059-61) to deny the right to compensation for the wrongful death of a person. Constitution Art. I, §§1 and 13." Citing Alabama Constitution," Alabama Power Co. v. Turner, 575 So 2d, 551, 562 (1992).

The Supreme Court in Central Alabama Electric Corp. v. Tapley, 564 So. Rptr., 371, 384 (1989), on review arising from judgment in a wrongful death action, did define wonton or willful behavior in relation as opposed to negligence. "Wanton or willful is sometimes expressed as reckless disregard for the safety of another" Id. 379. As pleaded in the petition for certiorari, the death of near kin according to post autopsy based on medical records arose from misdiagnosis by refusal to secure a third opinion before radical surgery, despite fact diagnostic data was in conflict and ample time exited (Petition for Certiorari, pg. 3). Facts are also pleaded that omission led to death, yet the Alabama Supreme Court denied certiorari

seeking the lower appellate court assume jurisdiction over an appeal seeking to obtain trail for alleged wrongful death, medical malpractice, and fraud by defendants.

Also, the decision by the Supreme Court of Alabama to deny writ was also totally contradictory to Alabama law based on Doctrine of Res Ipsa Loquitor applicable generally in malpractice actions. The doctrine holds a presumption of medical malpractice occurs when multiple physicians are parties in such complaints, 82 ALR 2d, 1227.

The Proposition Of Untimely Underlying Action In Support Of Disposition By The Alabama Supreme Court To Deny Certiorari Appears Absent Merit

A four year statute under Alabama law operates for bringing a medical malpractice action based on discovery of fraud. The facts in the record will reveal, as contends the statute was tolled by petitioner exhausting administrative remedies just prior to bringing action as follows:

1. Forwarded correspondence of concern to the office of the United State Attorney, Southern District of Alabama seeking assistance for

acquisition of investigation by Peer Review Agencies of Alabama of local complaint against defendants. Said correspondence clearly stated complaint investigation was sought in the interst of the wellbeing of the public. The complaint was based on an autopsy report which opined misdiagnosis and breached of contract by parties. The private physicians treated purportedly near kin under Medicare, a Federal Act.

2. Submitted settlement proposal to defendants at pre-complaint stage after petitioning the Probate Court for conservator. Offer was rejected and Boyd Reeves as attorney of record responded the parties were unintcrested.

Pursuant to Alabama law, the discovery of fraud by concealment or misrepresentation in medical malpractice actions extends the statute of limitations from two to four years, Trammer v. Bernstein, 596 So. 2d, 572, 575 (1991). As pleaded, a post-autopsy report secure clearly contradicted the cause of death of near kin found by codefendant Mobile Infirmary Medical Center. The final

autopsy report revealed the private diagnostic and attending physicians and acting as respondents for initial autopsy concealed information as did the Medical Center in the first autopsy report.

A. Timely Appeal Was Made To Supreme Court Of Alabama Of Judgment In Underlying Case

The petition for federal certiorari pleads denial by the Trial Court of Motions by defendants seeking order declaring notice of appeal of judgment dismissing underlying complaint for wrongful death as untimely (Id p.p. 4 and 5). A motion for reconsideration was also denied. Defendants, absent securing appellate review, filed motion to deny appeal (Id. p. 6). In citing Cohen v. Beneficial Loan Corp., 337 U.S. 545, 559 (1948), petitioner did establish appeal was timely brought in courts beginning from the initial jurisdiction to the Supreme Court of Alabama.

Certiorari Should Be Granted As Defendant Has Failed To Dispute The Underlying Matter Evolved Into Denial Of Constitutional And Civil Rights Of Petitioner

An issue in the current petition for certiorari is whether or not petitioner was denied equal right to bring wrongful death action and also equal protection of the law by the Appellate Courts of Alabama.

Arguments by petitioner plead a notice was forwarded to the Office of the United States Attorney seeking intervention to secure investigation of complaint against physicians who are defendants in current action by Peer Review Agencies of Alabama. Referenced physicians rendered services purported to near kin under Medicare, a Federal Act, where breached of contract allegedly transpired. Section1981 affords equal treatment pertaining to government contracts. Although denied by defendant absent pleading under perjury, petitioner did factually assert a right to relief under §1981 in each proceeding in the Courts of Alabama.

The petition seeking grant of certiorari by the United States Supreme Court alleges denial under the Equal Protection Clause of Amendment Fourteen of equal treatment in denial of certiorari by the Supreme Court of Alabama. Facts unpleaded are the Court rendered appellate disposition 537 days after petitioner timely filed petition. However, by Alabama Rules of Appellate Practice, Rule 4, which adopts timeframes

recommended by the American Bar Association, appellate dispositions are to be rendered sooner.

In relation to the foregoing pleading, disposition was rendered by the Final Court of Jurisdiction in Alabama only transpired after receipt from petitioner of correspondence to the American Bar Association of concern. The agency did respond, stating the Bar did not intervene in such matters, but submitted a list of Pro Bono law firms.

As pleaded, petitioner was similarly situated to defendant physicians by a degree of semblance in formal education, but was in different racial and gender classification. The Supreme Court of Alabama decided to forego request that defendants respond to the issues in the petition for certiorari (Petition for Certiorari to the United States Supreme Court, p. 6). The Court failed to prior give notice whether or not review would transpire.

Therefore, it is submitted the underlying wrongful death-medical malpractice case did evolve into a constitutional matter.

Petitioner, despite diligence and evidence, has been denied relief for determination if defendants adhered to prescribed norms of medical practice in relation to death of near kin by seven courts of Alabama, beginning in 2004. The courts are the Probate Court of Alabama, two state courts of original jurisdiction, and two United States

District Courts whereby latter federal action sought solely injunctive and declaratory relief to secure Peer Review Agencies of Alabama investigate complaint against physicians. The Assistant Attorney Generals for the State of Alabama are attorneys of record for the Peer Review Agencies, and the director is a state senator. Both level appellate courts in Alabama have denied all actions brought. Review of the latter decision by the District Court is currently before the United States Court of Appeals for the Eleventh Circuit.

A Certiorari Should Be Granted As Alabama Law Prohibiting Pro Se Representation Departs From Federal Law

Defendants assert Alabama law prohibits actions brought by pro per litigants citing Ex Parte Ghafrey, M.D. v. Korn, M.D., 738 So. 2d., 778, 782 (1998). The Alabama Legislature enacted law prohibiting pro se litigation to protect the public on the following grounds, as declared in Ghafrey, Id:

1. "By protecting citizens from ignorance and lack of skill on the part of those who are untrained and inexperienced in the law."

2. "By protecting the courts in their administration of justice from the inference from those who are unlicensed, and are not officers of the court."
3. "By preventing the unscrupulous from using the legal system for their own purpose to the detriment of the system and to those who may unknowingly rely on it." Citing Ex Parte Ghafrey, p. 79.

Fore-referenced grounds to bar pro per litigation in Alabama depart from federal rules.

In the reply brief in opposition to writ, defendants report failure of petitioner to appear at hearing of the motion to dismiss underlying complaint. Failure thereof was due to the fact of incapacitation by health problems arising from circumstances in the course of dealing with Alabama in the death of near kin and the circumstances of the death. Petitioner at the time of hearing was without livelihood due to placement on involuntary leave by employer as evidence in Appendix confirms. Petitioner in responsive pleadings in opposition to motions to dismiss provided defenses to each ground supported by facts and legal authorities. Also, documentary evidence was provided, including the notices from the Office of the United States Attorney and document of final autopsy report.

The Supreme Court of Alabama in Ghafrey did hold pro se litigation legal if brought representing only the interest of the litigant. Because petitioner was sole plaintiff in the underlying wrongful death action, and there were no other heirs, a right existed to pro se litigation if unable to obtain legal representation.

Facts plead petitioner did obtain medical expert as to matter whether negligence of defendant led to misdiagnosis, unnecessary surgery, and death of mother. Under Alabama law, the second issue of whether defendants obtained authorization to perform surgery or treat decedent may be established absent an expert witness upon evidence, such as medical records, a layman jury understands.

Conclusion

Petitioner respectfully requests, based on grounds pleaded, for grant of certiorari by the Honorable Supreme Court of the United States.

Dated: December 13, 2008

Respectfully submitted by:

Janice Abner

Janice Abner, Petitioner

APPENDIX 1

NOTICE FROM THE PROBATE COURT OF MOBILE COUNTY, ALABAMA

July 27, 2006

Ms. Janice Abner
886 Victor Avenue, Unit #16
Inglewood, CA 90302

In Re: Petition for Letters of Administration

Dear Ms. Abner:

As per our telephone conversation, I am returning to you the petition to open an intestate estate which was filed in our Court on July 7th, 2006.

Code of Alabama §43-2-22 states (a) No person must be deemed a fit person to serve as executor who is under the age of 19 years, or who has been convicted of an infamous crime, or who, from intemperance, improvidence or want of understanding is incompetent to discharge the duties of the trust. **Nor shall any nonresident of the state be appointed as administrator**

unless he is at the time executor or administrator of the same estate in some other state or territory or jurisdiction, duly qualified under the laws of that jurisdiction.

Also, I tracked, on the United States Postal Service website, the certified mail of your money orders for court cost and publication fee. The tracking information states that the item was accepted in INGLEWOOD, CA. It seems that this was sent to you. Please see the enclosed 'Tract and Confirm.' Also, there is a copy of the confirmation of our receipt of your petition for letters of administration.

As I stated earlier, you may want to contact Frank Krusei, the General Administrator for Mobile County, AL. His telephone number is 215-438-9100.

Very truly yours,
Carol Ann George
Judicial Coordinator

APPENDIX 2

NOTICE FROM THE OFFICE OF THE UNITED STATES ATTORNEY SOUTHERN DISTRICT OF ALABAMA

April 13, 2006

Alabama State Board of Medical Examiners
Office of the General Counsel
P.O. Box 946
Montgomery, Alabama 36101-0946

RE: Complaint Against Mobile Infirmary Medical Center by Family of Lillian Abner

Dear Sir or Madam:

Enclosed please find a complaint against Mobile Infirmary Medical Center of Mobile, Alabama by the family of Lillian Abner. The complaint was sent to this office by Ms. Abner's family, and is related to the death of Lillian Abner while she was a patient at the Infirmary. Also enclosed in support of the complaint is a letter from Ms. Janice M. Abner, medical records, a pathology report from Mobile Infirmary, and an autopsy

performed by Glenoaks Pathology Medical Group of La Canada, California.

The Glenoaks autopsy concluded that Mrs. Abner "died as a result of hypovolemic (hemorrhagic) shock due to untreated severe post operative blood loss." Report at 3. The autopsy further questions the treatment that Mrs. Abner received, and questions the listed cause of death - cardiac arrest secondary to a nonischemic cardiomyopathy.

Mrs. Abner's family believes that her death at Mobile Infirmary in August, 2002, was the result of negligence, if not gross negligence. At this point, it appears as though it is too late to file a civil action, but the family is concerned that if the issues involved in Mrs. Abner's death are not addressed that others may suffer. Moreover, they also want to get to the bottom of what may be a suspicious death.

We would appreciate it if you could review the enclosed documents to determine if any improper treatment occurred. If you are not the correct person to receive this, I would appreciate it if you would forward this to the appropriate person, agency, division, etc.

If you have any questions, please feel free to contact me. I may be reached at (251) 441-5845.

Sincerely,
DEBORAH J. RHODES
UNITED STATES ATTORNEY
By Eugene A. Seidel
Assistant United States Attorney

APPENDIX 3

REQUEST FOR MEDICAL EXAMINATION FROM COMPTON UNIFIED SCHOOL DISTRICT

June 3, 2005

Ms. Janice Marie Abner
888 Victor Avenue #16
Inglewood, CA 90302

U.S. Certified Mail
7002 0510 0004-
3792 9959

Re: Request for Medical Examination

Dear Ms. Abner:

I am writing regarding your current status as an employee with Compton Unified School District. The District is requesting that you agree to be examined by a District-selected physician at District expense. The request is submitted pursuant to Article XII, Section 12.18 of the CEA/ District Collective Bargaining Agreement, which provides as follows:

> 12.18. If the District believes that an [sic] unit member cannot safely or adequately

perform the duties of his/her position, or if a member is using any leave based on an illness or an injury, the District may require that the unit member be examined by a District-selected physician at District expense. This section shall be applicable to members of all Association bargaining units.

As previously conveyed, the District has serious concerns about your ability to safely perform your counseling responsibilities, including interacting with District students as well as properly participating in IEP meetings.

Please confirm in writing that you will agree to the requested examination and, if so, provide any dates in June and July 2005 on which you would not be available for the examination.

Thank you for your cooperation in this matter.

Sincerely,
Jesse L. Gonzales, Ph.D.
Superintendent

APPENDIX 4

JUDGEMENT OF THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

JANICE ABNER,	)
Plaintiff,	)
	) CASE NO. CV-06-2470
v.	)
AL BD OF MEDICAL	)
EXAMINERS, et al.,	)
Defendants.	)

ORDER

This case comes before the Court on a "Petition for Peremptory Writ of Mandate" filed by the Petitioner, Janice Abner, on September 19, 2006. Motions to Dismiss were filed by Defendant Alabama Board of Medical Examiners on October 17, 2006, and Defendant Alabama Department of Public Health on October 19, 2006. Subsequent pleadings were also filed by all parties. Two hearings have been held in this case, one on

October 19, 2006, and another on December 4, 2006, during which all parties were allowed to present arguments and additional exhibits.

After reading and considering all pleadings, exhibits and arguments, the Court is of the opinion that the Defendant's Motions to Dismiss are due to be GRANTED.

I tissue therefore the ORDER of the Court that this case be DISMISSED with prejudice and that copies of this Order be transmitted to all parties of record.

DONE and ORDERED this 15 day of April, 2007.

WILLIAM A. SHASHY
CIRCUIT JUDGE

APPENDIX 5

NOTICE FROM THE AMERICAN BAR ASSOCIATION

Thank you for taking the time to write. Regretfully, we are unable to provide the type of assistance that you request, as the ABA is a national voluntary legal professional organization. The American Bar Association sponsors a numerous of programs to improve the justice system, but is not able to help people with specific legal problems or cases, as we do not provide legal advice. The Association is also not able to refer you to an attorney. In addition, we do not rank our members or provide information about their credentials to either the public or other members.

If you have complaints about an attorney, judge, or the justice system, please note that the only role that the ABA plays in lawyer discipline is to provide general recommendations and guidelines to state disciplinary authorities and courts for improvements in the disciplinary process. The ABA has no jurisdiction and no authority over state bar associations. Ultimate authority for lawyer discipline in each state lies with the supreme court of that state. Therefore, we are unable to help you with your grievance/ disciplinary complaint.

Please contact the state's disciplinary agency using the enclosed directory.

Enclosed please find a State by State Directory of Pro Bono Programs. Please be specific when contacting the agency so they may address your needs appropriately.

Please note we have returned your documents with this response.

Best wishes in your future endeavors.

Best regards,
Frank Brewer
ABA Service Center